UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SEAN D. MURPHY, Petitioner) Civil No. 2:15-CV-16
) Crim. No. 2:11-CR-151
v) Judge George C. Smith
UNITED STATES, Respondent) Mag. Judge Preston Deavers

PETITIONER'S REPLY TO GOVERNMENT'S RESPONSE TO § 2255 PETITION AND MOTION FOR NEW TRIAL

Petitioner, Sean D. Murphy, hereby replies to the Government's Response to the § 2255 Petition and Motion for New Trial (Doc.# 206), pursuant to the Rules Governing § 2255 Proceedings, Rule 5(d).

OVERVIEW

After reviewing the Government's Response to Petitioner's § 2255 Habeas Corpus Petition and Motion for New Trial, Petitioner states the Government's Response:

(1) Falls short of the procedural requirement necessary to overcome the relief requested in Petitioner's consolidated pleading;

(2) Essentially concedes to [some of] Petitioner's claims;

(3) Amounts to perpetrating a fraud upon the Court that would result in a miscarriage of justice;

(4) Misleads the Court on certain factual issues and legal arguments;

(5) Fails to prove Petitioner crossed state lines with stolen goods as required by 18 U.S.C. § 2314;

(6) Attempts to transform material legal claims supported by the record into minor discrepancies;

(7) Wrongfully asserts there was overwhelming evidence of Petitioner's guilt at Trial, where the "only" witness to place the Petitioner in the State of Ohio between January 17, 2009 and January 18, 2009,

is Robert Doucette, whose Grand Jury and Trial testimony has proven to be false; and

(8) Fails to acknowledge that Petitioner was taken by surprise by Robert Doucette's Trial testimony, and, was denied the ability to investigate based on defense counsel's actions.

ARGUMENT

The Government's entire argument at trial, and, the Government's recitation of the facts encompassed in their response to the Petitioner's consolidated § 2255 pleading focused specifically on proving Petitioner thus committed the "burglary" of Brink's on the weekend of January 17, 2009. However, Petitioner was <u>never</u> charged with the "burglary" of Brink's. Petitioner was indicted for Interstate Transportation of Stolen Goods ("ITS") in violation of 18 U.S.C. § 2314 and Conspiracy to Commit ITS in violation of 18 U.S.C. § 371 and 2. As it pertains to the proceedings, the Government must prove Petitioner crossed

state lines with stolen goods to support a conviction of ITS and Conspiracy to commit ITS. In both instances, the Government failed to meet their burden to overcome the relief requested in the Writ.

At trial the Government only produced the testimony of Robert Doucette to prove Petitioner crossed state lines with stolen goods. In their Response to Petitioner's consolidated § 2255 pleading, the Government conveniently omitted any reference to facts establishing [when] the crew made their way back to Massachusetts after the Brink's burglary. Obviously, because the Government is satisfied with Plaintiff's newly discovered evidence that Doucette lied as to when the crew returned to Massachusetts and in many other areas. Petitioner construes this omission as the Government's conceding to the fact that Robert Doucette committed material perjury at Trial.

Petitioner will explain how Robert Doucette's intentional perjury goes to the core charges of ITS. The Declaration of Joseph Morgan in conjunction with certain matters Private Investigator ("PI") Gary Phillips was instructed to locate and

obtain rental records for that would affirmatively establish there was a second storage facility used by the perpetrators that Robert Doucette [purposely] omitted from his Grand Jury and Trial testimony. (Vol. 6, pp. 11-12)

Doucette did testify that the storage facility used to store the stolen coins and money in was @ two hours from the Pennsylvania ("PA") Hotel the crew stayed at the weekend of the Bank's burglary. (Vol. 3, p. 206). This is [Key] area where Doucette got caught up. The PA storage facility was only minutes away from the Hotel as proven by Petitioner's Exhibits attached to his § 2255 pleading. It was the "Eastern Ohio" storage facility that was @ 2 hours from the PA Hotel.

Doucette purposely omitted any reference to the Eastern Ohio storage facility because an "incident" occurred at that location that would [change the nature] of the offense(s), thus qualifying [all] Defendants as Career Offenders. Doucette's lapse in memory as it relates to the Eastern Ohio storage facility ... was complete self-serving. That is why Doucette's answer to Petitioner's

question regarding the Eastern Ohio storage facility was "I don't recall" (Vol. 3, p. 195). That answer avoided a direct perjury charge for Doucette [if] the Petitioner had the "evidence" of the Eastern Ohio facility. Doucette suspected Petitioner was well-prepared for Trial. He just did not know how-prepared. (Vol.)

Doucette also testified the plan was to come back from Ohio "empty", meaning nothing would come back with the crew. (Grand Jury Minutes, p. 47; attached to Defendant's Exhibits AT TRIAL). David Nasson testified the crew had "no money" when the crew returned to Lynn, MA after the Brink's burglary. (Vol. 1, p. 185). Doucette and Joseph Morgan went to get the money and tools [after] Petitioner got arrested on unrelated matter on 1/23/2009. (Vol 3, p. 127; Vol. 4, p. 23)

The fact of the matter is Petitioner did not cross state lines with stolen goods. Petitioner is well-versed in the law, a certified paralegal. (Vol. 1, pp. 9-11). Part of the reason for selecting to do crime in Ohio was because of Ohio's fairly lenient laws (Vol. 1, p 165).

Petitioner has a prior federal offense involving ITS of a Stolen Firearm. (Pretrial Investigation Report). Petitioner Knew [he] could not cross state lines with stolen goods or it would automatically "open the door" to federal prosecution and much stiffer penalties. Therefore, Petitioner took every precaution to ensure [he] did not cross state lines with stolen goods. The Government has acknowledged and argued this was a spelled-out, sophisticated [well-planned] heist. If not for the unforeseen incident at the Eastern Ohio storage facility, Doucette would not have purposely omitted that part of the story in his testimony. No stolen goods at all crossed state lines on Petitioner's watch.

Petitioner will now address each of the Government's responses in the order they appear in their Memorandum.

I Ineffective Assistance of Counsel.

Petitioner relies on [and refers to] the argument and caselaw in his original Memorandum of Law submitted with his consolidated pleading. In addition thereto,

Petitioner argues:

A. David J. Graeff's Affidavit is without Merit.

Attorney Graeff averred in his Affidavit (Doc. # 207) that:

1. The investigation conducted by PI Gary Phillips continued up to the eve of trial (para. 4) thus implying that he did not tell PI Phillips to stop investigating

This averment is a blatant misstatement. Attorney Graeff told Petitioner on Sunday (night), October 16, 2011, that he told PI Phillips to "stop investigating" @ 2 weeks prior to the Suppression Hearing. When Petitioner asked Atty. Graeff why he told PI Phillips to stop investigating, Atty. Graeff said "I don't know." The next morning, Monday, October 17, 2011, Petitioner told the Court what Attorney Graeff did. Atty. Graeff then told the Court "everything Mr. Murphy said is 'correct'." (Vol. 1, pp. 3-4).

Atty. Graeff's own admission on the day trial commenced contradicts his newly sworn Affidavit

This uncalled for action by Atty. Graeff "blind-sided" Petitioner and caused Petitioner to proceed Pro-Se as it was abundantly clear Atty. Graeff was NOT acting in Petitioner's best interest.

Additionally, PI Gary Phillips testified that Atty. Graeff "instructed him to stop investigating" (Vol. 6, pp. 6, 9, 11) which prevented PI Phillips from completing the majority of the tasks Petitioner needed to be investigated. If there were any reservations as to whether Atty. Graeff instructed PI Phillips to stop investigating, PI Phillips trial testimony resolves the matter definitively.

AUSA Salvador Dominguez was present in Court when Atty. Graeff admitted to the Court what he did to Petitioner as it pertains to stopping the investigation and was also present during PI Phillips testimony. For the Government to [now] argue that the factual record demonstrates the private investigator never stopped working on Murphy's case (Govt's Resp. p. 20) is

simply perpetrating a fraud upon the Court that would result in a miscarriage of justice.

Had PI Phillips not been instaucted to stop investigating, he would have located the Eastern Ohio storage facility based on Petitioner's detailed instructions as to where the storage facility was located and specific chanachteristics (sic) of the storage facility. Locating the storage facility and obtaining Rental Records for Brian Hetherman would prove that Doucette committed perjury, and, that no stolen goods crossed state lines. The Govt. realizes this fact. (Govt. Resp., p. 25 FN 2).

Regarding the Hotel, Petitioner was "caught by surprise" when Doucette denied staying at a Hotel on Sunday, January 18, 2009. When Petitioner addressed the matter with PI Phillips after Doucette's trial testimony, PI Phillips reminded the Petitioner that he could not and did not complete the majority of the original tasks he was requested to perform. There was no way he could locate the Hotel records and the location of the Hotel

and obtain the necessary information for the Petitioner within a day or two before the in-progress trial ended. The Hotel records would have proven: (1) Doucette committed perjury; and (2) that stolen goods did not cross state lines on January 18, 2009, as Doucette testified to. Petitioner attempted with due diligence to obtain the information but was thwarted by his [only] means to produce the evidence at trial.

2. Attorney Graeff's "recollection" to instruct PI Gary Phillips to not post a notice in various colleges and universities at the request of Mr. Murphy occurred [after] trial had commenced while Petitioner was proceeding Pro-Se and not during the pre-trial stages. (para. 6)

Furthermore, PI Phillips told Petitioner he did post the notice on bulletin boards at local colleges. Therefore, Atty. Graeff's recollection is misplaced.

3 Attorney Graeff's "recollection" to instruct PI Phillips not to send a

a letter to a co-defendant at the Delaware County Jail also occurred [after] trial commenced while Petitioner was proceeding Pro-Se and not during the pretrial period. (para. 8) (See Trial Transcript, Day 6 "Sealed", 10/20/2011, pp. 195-196)

It is important to note that David Nassor is NOT a co-defendant in this matter.

4. Attorney Graeff avers that when Murphy asked him if he had the Doucette recorded statement, he said "no" because he did not have the Doucette tape at counsel's table. (para. 14)

This averment by Atty. Graeff is a feeble attempt to deflect the many ineffective errors made by Atty. Graeff while representing the Petitioner. First, Petitioner was very clear when he questioned Atty. Graeff about the recorded Doucette statement. Atty. Graeff told Petitioner "he never received it." Second, if in fact Atty. Graeff [did]

receive the Doucette recorded statement, he had a "duty" to turn it over to Petitioner when Petitioner elected to proceed Pro-Se. Even more so, when Petitioner inquired as to whether Atty. Graeff received Doucette's recorded statement during trial. Atty. Graeff failed to provide Doucette's recorded statement to Petitioner which amounts to ineffectiveness.

5. Attorney Graeff's recollection that the Doucette recorded statement basically reflected what he testified to (para. 15) is factually untrue.

Atty. Graeff cannot independently determine [what] information Petitioner was seeking to discover from the Doucette recorded statement. For instance, Doucette testified that Petitioner went to a local homeless shelter to collect DNA evidence to plant at the scene of Brink's. (Vol. 3, pp 33-34; Vol. 4, pp. 86-87). This alleged statement did not appear in Doucette's Grand Jury testimony, nor did this statement appear on [any] FBI-302 Report. The statement is of material relevance where Petitioner

received a 2-point increase in his base level offense score for Obstruction of Justice for allegedly planting DNA evidence at Brink's. Coincidentally, Doucette does NOT claim to have observed Petitioner collecting the DNA.

Additionally, Doucette's recorded statement would have given Petitioner additional evidence to prove Doucette perjured himself at trial, where Doucette lied no less than 19 times at trial. Some lies were material some not so material. The recorded statement surely would have assisted Petitioner. It was the "omissions" from the recorded statement that Doucette subsequently testified to at the Grand Jury and at Trial that Petitioner was seeking.

For these reasons alone, Atty. Graeff's Affidavit is without merit.

B. The Government's assertion that the Petitioner did not request the Court to issue Subpoenas for defense witnesses Attorney Graeff failed to Subpoena at Petitioner's request, also lacks merit.

When Atty. Graeff told Petitioner he instructed PI Gary Phillips to stop investigating, Atty. Graeff also told Petitioner he did not subpoena the defense witnesses Petitioner requested Atty. Graeff to subpoena (Vol. 1, pp 3-4). Contrary to the Govt.'s assertion (Govt.'s Resp. pg. 24), Petitioner did request the Court to issue Subpoenas to defense witnesses. PI Gary Phillips filled out the necessary Forms. The Court sided with the Government and denied the Subpoenas. (Vol. 1, p 20). Petitioner also wanted to recall Doucette as a defense witness. * The Court again sided with the Government and denied Petitioner's request to recall Doucette as a defense witness. (Vol. 1, p 224). Allowing Petitioner to recall Doucette [may] have affected the jury's verdict.

* (Vol 4, pp. 113, 150-154)

Petitioner's defense witnesses would also have testified to what they observed when the crew returned from Ohio and conversations amongst the co-conspinators during the span of the conspiracy. This testimony would also have contributed to proving Doucette committed perjury in material areas of his trial testimony.

In conclusion of the Ineffective claim, Atty. Graeff's pre-trial representation of Petitioner fell measureably (sic) below an objectionable standard of reasonableness. Atty. Graeff's Affidavit contradicts his own admissions made on the record at the beginning of trial and is also in contradiction to Petitioner's averments and PI Gary Phillips' trial testimony.

The habeas petition should be granted for ineffective assistance of counsel.

II Actual Innocense

In addition to Petitioner's arguments, caselaw and exhibits in Petitioner's consolidated pleading, Petitioner replies to the Government's Response as follows, for the actual innocense claim:

Petitioner has claimed that he is actually innocent of the ITS charge. The only Government witness alleging Petitioner crossed state lines with stolen goods was Robert Doucette ... who is a [proven] perjurer.

The crew's plan was to come back home empty (Grand Jury testimony of Robert Doucette, p. 47) or as little as possible (Vol. 3, p 113). David Nassor testified he never

"saw" or "received" any money when the crew returned from Ohio (Vol. 1, p. 185)

Additionally, if the plan was to come home empty as Doucette testified, then there was no "conspiracy" to cross state lines with stolen goods.

Even though the Government claims the Petitioner proffered his involvement in the caper prior to trial, the Government did not present an admission by Petitioner that he crossed state lines with stolen goods.

Petitioner presented evidence that Morgan and Doucette acted alone [after] the Petitioner was in jail on an unrelated matter in ultimately crossing state lines with stolen goods.

It is important to note that the Petitioner also avoided any reference to the Eastern Ohio storage facility for the same reason(s) Doucette did. More importantly, Petitioner's Proffer letter specifically stated if Petitioner makes any statement not relating to "theft-related" offenses, Petitioner will be prosecuted. This Proffer Letter was prepared by and signed by AUSA Salvador Dominguez on January 29, 2010. Therefore, Petitioner was contractually bound to only

discuss non-violent theft-related crimes or he would be prosecuted.

The Government's assertion that the Petitioner's actual innocense claim is baseless is a hollow argument with no proper support of their argument.

III. Doucette's Recantation

In addition to Petitioner's original arguments, caselaw and exhibits in the consolidated pleading, Petitioner replies to the Government's Response to Doucette's recantation as follows:

The Government recites the testimony of witnesses who corroborated Doucette's trial testimony in [areas] of Doucette's testimony not contested by Petitioner.

Petitioner concedes that Doucette did not completely fabricate his entire testimony. Petitioner argues that Doucette purposely lied at least nineteen (19) times at Trial, including telling the jury "he was as honest as he could be." (Vol. 4, p. 113). Collectively, the many instances of material perjury, in conjunction with the many instances of not so material perjury, should persuade the Court to grant relief.

The Government argues the Court was in a position to observe Doucette's demeanor and to determine his credibility as he testified (Govt.'s Resp. pp. 29-30). The Petitioner agrees. That is why Judge Smith asked Doucette "where is the rest of the money" on the day Doucette was sentenced. because the Court was skeptical towards Doucette's Trial testimony (Exhibit D of the § 2255 Petition). In denying Petitioner's Rule 29 motion, the Court ruled Petitioner did not "prove" Doucette committed perjury (Doc # 146). Petitioner has now met his burden.

It is abundantly clear many areas of Doucette's trial testimony were false. It cannot be said that the jury would not have reached a different verdict had the many instances of false testimony been presented to the jury with evidence of its falsity.

The Government's argument that Rob Doucette's testimony was credible and substantially corroborated misleads the Court where Petitioner "proved" Doucette committed perjury in matters material to the charge of ITS.

Doucette recanted in front of an Anthony Moschopoulos. Doucette admitted to lying at Petitioner's Trial. That recantation along with the newly discovered evidence of Doucette's perjurous statements, is sufficient to obtain relief.

IV Motion for New Trial

In addition to Petitioner's arguments, caselaw and exhibits in Petitioner's original consolidated pleading, Petitioner replies to the Government's New Trial Response as follows:

The Government's argument that Doucette simply did not recall staying one additional night in Pennsylvania following the burglary (Govt. Resp. p. 31) is an attempt to transform material factual legal matters supported by the record into minor discrepancies. The Government argues this fact is [not] material to the burglary itself. (Govt. Resp. p. 31). However, as argued above, Petitioner was not charged with the "burglary" of Brink's. Doucette's perjurous statements regarding not staying at the Hotel after the burglary go directly

to the actual charge of ITS and whether or not Petitioner crossed state lines with stolen goods. Doucette testified at the Grand Jury and at trial that on Sunday, January 18, 2009, the crew drove directly back to Lynn, MA after the Brink's burglary. Yet, Hotel records prove that did not occur. So Doucette's testimony as it relates to crossing state lines has proven to be false.

The Government argues that Petitioner could have obtained the Hotel records in October 2011 with due diligence. That argument fails. First, Petitioner did attempt to have PI Phillips locate the Hotel and obtain guest records for the Hotel, when Doucette's testimony "caught Petitioner by surprise." PI Phillips stated he could not complete the task as the Trial was nearing its end when Doucette committed the perjury on cross-examination. Second, when Petitioner called the Comfort Inn in Mars, PA after taking 10 months to locate and identify the Hotel (from jail), the General Manager of the Hotel told Petitioner they only keep records for 2 years and did not have the January 2009 records. The manager would not tell Petitioner if [any] law enforcement

contacted them regarding William Palavacini staying at the Hotel on January 18, 2009. Petitioner then Subpoenaed the Hotel records and finally obtained the evidence he needed in June 2013. However, the Petitioner was "in-transit" back to Ohio in June 2013 to be resentenced. the Petitioner was not returned to Bristol County Jail until December 20, 2013. Furthermore, Petitioner had to wait for his 2nd Direct Appeal to be resolved before he could file the consolidated pleading. When Rule 33 time limits were approaching, Petitioner was required to file the consolidated pleading.

Third, the Government states that [if] they knew the name of and the location of the Hotel, they would have subpoenaed the documents (Govt. Resp. p. 32). Petitioner did tell the Government the location of the Hotel, which the Government could have easily located. The Government did not produce any information relating to the Hotel because: (1) their Star Witness, Robert Doucette, was purposely misleading the Government; and (2) the Government did not want to provide the Petitioner with evidence that their Star

Witness was lying. The Government had incentive NOT to produce the Hotel records. Both Petitioner and Joseph Morgan stated the crew stayed at the same Hotel on January 16, 2009 and January 18, 2009.

The Government argues the Joseph Morgan Affidavit does not exonerate Murphy. (Govt. Resp. p. 33). Contrary to the Government's assertions, the Morgan Affidavit does exonerate Petitioner. The Morgan Declaration establishes Petitioner is not guilty of ITS. No stolen goods crossed state lines with Petitioner present. Morgan finally agreed to come forward after reading all the lies contained in Doucette's Trial testimony. Morgan could not let Doucette's perjurous testimony result in a miscarriage of justice. It was Morgan who pointed out to Petitioner the majority of lies as Morgan was with Doucette after the Petitioner went to jail.

Doucette's lies were not mere inconsistencies. Doucette purposely lied under oath, and also, admitted to lying to the Grand Jury (Vol. 3, pp. 168-169; Vol. 4, pp. 21-22) The Government knew Doucette was lying to the Court and to the jury. The

Reaction of the prosecutor when Doucette denied staying at the Hotel on Sunday, January 18, 2009, were clear and convincing The prosecutor exhibited compunction. The Government's only response was "the Government had no affirmative proof the crew spent the night in Pemsylvania." [Govt. Resp. p. 36). Petitioner construes that statement by the Government as an admission that it had information the crew stayed at a Hotel after the Brink's burglary. More importantly, the Government does not deny it had information the crew stayed at a Hotel near the PA storage facility on January 18, 2009.

The Government further argues that Doucette's testimony reflects his "recollection of events" and there is no way Murphy can argue that Doucette's characterization of false testimony were not the result of confusion, mistake or faulty memory. (Govt. Resp. p 36). Unfortunately, the Government did not review Petitioner's cross-examination of Doucette at trial. Petitioner specifically asked Doucette if he remembered doing laundry at the Hotel while the crew went back to Brink's to see if police discovered the burglary (Vol. 3, pp. 212-213). Doucette

affirmatively denied it and stated why would we do that, it makes no sense. Petitioner told the Government the crew went back to Brink's on Sunday, January 18, 2009 to see if the burglary had been discovered. For the Government to argue that Doucette's testimony was not "false testimony" misleads the Court and amounts to perpetrating a fraud upon the Court.

The Affidavits of Joseph Morgan and Anthony Moschopoulos were obtained: (1) [Morgan's] shortly after he read Doucette's trial testimony; and (2) [Moschopoulos'] after Doucette was released from federal prison in 2013 and returned to Lynn, MA to make the statements in front of Anthony Moschopoulos. Petitioner presented the statements with his timely filed consolidated pleading. Therefore, Petitioner did not "sandbag" as the Government contends.

V. The 25 Allegations of Doucette Perjury

The Goveanment responds to Petitioner's detailed account(s) of Doucette committing perjury by claiming: Doucette was confused; mere discrepancies; not material; only

fodder; impeachment material; Doucette mixed up the names; inconsistencies and the jury apparantly believed Doucette.

As it pertains to #5, evidence of the crew returning to Brink's on January 18, 2009 was presented by the extra 452 miles on the rental car that Doucette pawned off as Murphy driving the car around Lynn, when it was established that the rental car stayed in Doucette's driveway until Murphy was arrested two days after returning from Ohio. (Vol. 4, pp 16-18)

As it pertains to #9, the "only" Key to the PA storage bin was seized by State Police on January 23, 2009, in Murphy's residence ... not in PA (Vol 2, p. 172)

As it pertains to #13, no "wet" money was seized at Murphy's residence. No Report or testimony stated the money seized was wet.

As it pertains to #23, had Murphy presented evidence of Doucette's blatant perjury (as he does now) the jury may have reached a different result.

When the Court reviews [all] of the Doucette lies collectively, it cannot be said Petitioner received a fair trial.

CONCLUSION

In conclusion, the Government's Response falls short of the procedural requirement necessary to overcome the relief requested in Petitioner's consolidated pleading. The record is sufficiently clear for the Court to grant the Petition.

Respectfully submitted,

SJ

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Dated: 6-2-2015

DECLARATION 28 U.S.C § 1746

I, Sean O. Murphy, declare that a copy of this Reply has been sent to AUSA Salvador Dominguez, and also to the Clerk, by placing it in the prison mailbox on this date, postage prepaid; under the penalties of perjury

SJ

Sean O. Murphy